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TOR		41

Court File No.: T-316-22

FEDERAL COURT

B E T W E E N:

CANADIAN CIVIL LIBERTIES ASSOCIATION

Applicant
(Moving Party)

and

ATTORNEY GENERAL OF CANADA

Respondent
(Responding Party)

RESPONDING MOTION RECORD OF THE ATTORNEY GENERAL OF CANADA

Applicant's Motion to Compel re Denis Beaudoin

July 12, 2022

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8

David Aaron

Tel: (343) 804-9782
David.Aaron@justice.gc.ca

Counsel for Respondent, the Attorney General of Canada

TO: THE REGISTRAR
Federal Court
180 Queen Street West, Suite 200
Toronto, ON M5V 3L6

AND TO: HENEIN HUTCHINSON LLP
235 King St. E., First Floor
Toronto, ON M5A 1J9
Tel.: (416) 368-5000
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Ewa Krajewska
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Brandon Chung
bchung@hhlp.ca

Counsel for the Moving Part/Applicant,
Canadian Civil Liberties Association

I N D E X

	<u>Document</u>	<u>Pages</u>
1.	Affidavit of Barbara Brzezicki, sworn July 11, 2022	1 – 2
	Exhibit A – Email dated June 17, 2022 from M. Arulnesan attaching Direction to Attend	3 - 7
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2.	T-316-22 – Refusals Chart with CCLA and AGC Positions regarding the examination of D. Beaudoin	22 - 24
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Court File No.: T-316-22

FEDERAL COURT

BETWEEN:

CANADIAN CIVIL LIBERTIES ASSOCIATION

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

AFFIDAVIT OF BARBARA BRZEZICKI

I, BARBARA BRZEZICKI of the City of Toronto, in the PROVINCE of Ontario, make oath and say:

1. I am employed as a Paralegal with the Ontario Regional Office of the Department of Justice. I am the Paralegal assigned to this matter. As such, I have knowledge of the matters hereinafter deposed to, except where stated to be based on information and belief. To the extent my knowledge is based on other sources, I have identified the source and I verily believe the information to be true.

2. On Friday, June 17, 2022, John Provart, legal counsel for the respondent, forwarded an email from Mary Arulnesan, who is identified as a law clerk with the law firm Henein Hutchison LLP, serving on Dennis Beaudoin a direction to attend a cross-examination on his affidavit. According to the time stamp, this email was received on June 17, 2022 at 2:17pm. Attached and

marked as **Exhibit A** is a copy of Ms. Arulnesan's email and the Direction to Attend that was attached to it.

3. On May 3, 2022, Mr. Provart sent an email to applicant's counsel providing a draft cross-examination protocol. A copy of Mr. Provart's email and the attached draft protocol is attached and marked as Exhibit B.

4. I make this affidavit in support of the motion to compel in Court File No. T-316-22 and for no further or other purpose.

Sworn remotely by Barbara Brzezicki
stated as being located in the City of
Toronto in the Province of Ontario, before
me at the City of Toronto in the Province
of Ontario,
on July 11, 2022

in accordance with O. Reg 431/20,
Administering Oath or Declaration

Remotely Provart,
John

Digitally signed by Provart, John
DN: C=CA, O=GC, OU=Jus-Jus, CN="Provart, John"
Reason: I am approving this document with
my legally binding signature
Location: Toronto, Ontario
Date: 2022.07.11 15:23:19-04'00'
Foxit PhantomPDF Version: 10.1.1

Brzezicki
, Barbara

Digitally signed by Brzezicki, Barbara
DN: C=CA, O=GC, OU=Jus-Jus,
CN="Brzezicki, Barbara"
Reason: I am the author of this
document
Location: your signing location here
Date: 2022.07.11 15:00:57-04'00'
Foxit PhantomPDF Version: 10.1.1

BARBARA BRZEZICKI

Commissioner Name
LSO Number
A Commissioner for...

This is Exhibit “A” mentioned to
and referred to in the affidavit of

Barbara Brzezicki

Sworn before me this 11 day of

July, 2022

Provart, John

Digitally signed by Provart, John
DN: C=CA, O=GC, OU=Jus-Jus, CN="Provart, John"
Reason: I am approving this document with my
legally binding signature
Location: Toronto, Ontario
Date: 2022.07.11 15:23:49-04'00'
Foxit PhantomPDF Version: 10.1.1

A Commissioner for taking affidavits

Brzezicki, Barbara

From: Provart, John
Sent: June 17, 2022 4:09 PM
To: JUS.L TOR Emergencies Act Lit Team / Équipe du Contentieux mesur; Ottawa Emergencies Act Lit Team / Équipe du Contentieux mesur; JUS.L PRO Emergencies Act Lit Team / Équipe du Contentieux mesur
Subject: FW: T-316-22 - Direction to Attend to Denis Beaudoin
Attachments: 2022.06.17 - Direction to Attend to Denis Beaudoin.pdf

John Provart

Senior Counsel (Mr / he / him) | Avocat conseil (M. / il / lui)
 Department of Justice Canada | Ministère de la Justice Canada
 (647) 256-0784

Protected by Solicitor-Client or Litigation Privilege: Do Not Disclose

From: Mary Arulnesan <marulnesan@hhllp.ca>
Sent: Friday, June 17, 2022 2:17 PM
To: Provart, John <John.Provart@justice.gc.ca>; Anderson, R. Jeff <Jeff.Anderson@justice.gc.ca>
Cc: Ewa Krajewska <ekrajewska@hhllp.ca>; Brandon Chung <bchung@hhllp.ca>; Coleman, Rebecca <Rebecca.Coleman@justice.gc.ca>; Merrill, Erin <erin.merrill@justice.gc.ca>; Laldin, Ayesha <Ayesha.Laldin@justice.gc.ca>; Widdifield, Shain <Shain.Widdifield@justice.gc.ca>; Muhammed-Ally, Nur <Nur.Muhammed-Ally@justice.gc.ca>; Archibald-Graham, Karlene <Karlene.Archibald-Graham@justice.gc.ca>; 'Janani Shanmuganathan' <janani@gsllp.ca>; 'bmiller@fosterllp.ca' <bmiller@fosterllp.ca>; 'bsvandenbergh@fosterllp.ca' <bsvandenbergh@fosterllp.ca>; 'bdewolfe@fosterllp.ca' <bdewolfe@fosterllp.ca>; 'blair@ectorlaw.com' <blair@ectorlaw.com>; Alexander Boissonneau-Lehner <alehner@johnstonecowling.com>; David Cowling <dcowling@johnstonecowling.com>; 'Mandy England' <Mandy.England@gov.ab.ca>; Leah.McDaniel@gov.ab.ca; 'Sujit Choudhry' <suj@choudhry.law>
Subject: T-316-22 - Direction to Attend to Denis Beaudoin

Good afternoon,

Please see attached Direction to Attend to Denis Beaudoin for the above-noted matter, which is hereby served upon you pursuant to the *Federal Court Rules*.

As a courtesy, I am also cc'ing counsel on the related applications for judicial review.

Kindly confirm receipt.

Thank you,
 Mary

Mary Arulnesan (she/her)

Law Clerk
HENEIN HUTCHISON LLP | BARRISTERS |
 235 KING STREET EAST, FIRST FLOOR, TORONTO, ONTARIO M5A 1J9
 T: 416.368.5000 | F: 416.368.6640 | www.hhllp.ca

THIS MESSAGE MAY BE PRIVILEGED AND CONFIDENTIAL: This e-mail contains confidential information which may be protected by legal privilege. If you are not the intended recipient, please immediately notify us by reply e-mail or by telephone, delete this e-mail and destroy any copies.

Disclaimer

The information contained in this communication from the sender is confidential. It is intended solely for use by the recipient and others authorized to receive it. If you are not the recipient, you are hereby notified that any disclosure, copying, distribution or taking action in relation of the contents of this information is strictly prohibited and may be unlawful.

Court File No.: T-316-22

FEDERAL COURT

B E T W E E N:

CANADIAN CIVIL LIBERTIES ASSOCIATION

Applicant

And

ATTORNEY GENERAL OF CANADA

Respondent

DIRECTION TO ATTEND**TO: DENIS BEAUDOIN**

YOU ARE REQUIRED TO ATTEND AN CROSS-EXAMINATION on your affidavit sworn April 4, 2022, on Tuesday, June 21, 2022 at 12pm EST via zoom videoconference.

YOU ARE ALSO REQUIRED TO BRING WITH YOU and produce at the examination the following documents and things:

1. To produce a current curriculum vitae;
2. To produce the documents that the RCMP created that describe the process that the RCMP used to verify and share information with financial institutions described at paragraph 2 of the affidavit;
3. To produce any examples of correspondence or documents exchanged between the RCMP, the Ontario Provincial Police and the Ottawa Police Service by which the RCMP sought out and collected relevant information regarding persons, vehicles, and entities, that were believed to be directly or indirectly involved in prohibited activities as referred to at paragraph 10 of the affidavit;
4. To produce any other form of template document that the RCMP used to disclose information to banks, the Canadian Bankers Association, the Investment Industry Regulatory Organization of Canada, the Canadian Securities Administrators, credit unions and the MFDA as referred to at paragraph 12 of the affidavit;

5. Any documents, guidelines, or directions that the RCMP used or issued to its members that describe and/ or explain what is meant by “individuals and entities who were activity involve in illegal action, either by organizing or influencing the illegal activities or by being present at the illegal protest” as described at paragraph 16 of the affidavit;
6. Any document that, guideline or direction that the RCMP issued to its members that the RCMP did not disclose information pertaining to those who made donations in support of the protests as described at paragraph 17 of the affidavit;
7. Any memorandum in the power possession or control of the RCMP that explains the background, reasoning, or rationale for the position taken by the RCMP at paragraph 17;
8. Any document evidencing the assertion at paragraph 22 of the affidavit that the RCMP clearly communicated to these electronic financial service providers that the Order was not to be applied retroactively and could only be applied while the Order was in effect
9. Any memorandum in the power possession or control of the RCMP that explains the background, reasoning or rationale for the position taken by the RCMP at paragraph 32;

THE EXAMINATION WILL BE CONDUCTED IN ENGLISH. If you prefer to be examined in the other official language, an interpreter may be required and you must immediately advise the solicitor for the party conducting the examination.

IF YOU FAIL TO ATTEND OR REMAIN UNTIL THE END OF THIS EXAMINATION, YOU MAY BE COMPELLED TO ATTEND AT YOUR OWN EXPENSE AND YOU MAY BE FOUND IN CONTEMPT OF COURT.

INQUIRIES CONCERNING THIS DIRECTION may be directed to Ewa Krajewska

June 17, 2022



Ewa Krajewska
Henein Hutchison LLP
235 King Street East
Toronto, ON M5A 1J9

This is Exhibit “ B ” mentioned to
and referred to in the affidavit of

Barbara Brzezicki

Sworn before me this 11 day of

July, 2022

Provart, John

Digitally signed by Provart, John
DN: C=CA, O=GC, OU=Jus-Jus, CN="Provart, John"
Reason: I am approving this document with my legally
binding signature
Location: Toronto, Ontario
P Date: 2022.07.11 15:24:18-04'00"
Foxit PhantomPDF Version: 10.1.1

A Commissioner for taking affidavits

Brzezicki, Barbara

Subject: FW: T-306-22, T-316-22, T-347-22 and T-382-22 - Cross-examination Protocol / Cross-examinations

Attachments: T-306-22, T-316-22, T-347-22 and T-382-22 - Cross-examination Protocol _ Cross-examinations.pdf

From: Provart, John

Sent: Tuesday, May 3, 2022 6:49 PM

To: 'David Cowling' <dcowling@johnstonecowling.com>; 'Alexander Boissonneau-Lehner' <alehner@johnstonecowling.com>; 'Simon Sigler' <ssigler@johnstonecowling.com>; 'Aditi Gupta' <agupta@johnstonecowling.com>; 'Janani Shanmuganathan' <janani@gslp.ca>; 'Ewa Krajewska' <ekrajewska@hhllp.ca>; 'Sujit Choudhry' <suj@choudhry.law>; 'mgourlay@hhllp.ca' <mgourlay@hhllp.ca>; 'bsvandenbergh@fosterllp.ca' <bsvandenbergh@fosterllp.ca>; 'bmiller@fosterllp.ca' <bmiller@fosterllp.ca>; 'blair@ectorlaw.com' <blair@ectorlaw.com>; 'Mandy England' <Mandy.England@gov.ab.ca>

Cc: Anderson, R. Jeff <Jeff.Anderson@justice.gc.ca>; Kohlman, Kathleen <Kathleen.Kohlman@JUSTICE.GC.CA>; Coleman, Rebecca <Rebecca.Coleman@justice.gc.ca>; Widdifield, Shain <Shain.Widdifield@justice.gc.ca>; Archibald-Graham, Karlene <Karlene.Archibald-Graham@justice.gc.ca>

Subject: T-306-22, T-316-22, T-347-22 and T-382-22 - Cross-examination Protocol / Cross-examinations

Dear Counsel,

In advance of tomorrow's CMC, we wanted to provide you with a draft protocol for cross-examinations that we have been working on – consistent with the Court's direction of April 19. This is based on protocols that have been used in other cases involving multiple applicants and affiant cross-examinations, to foster the fair and efficient conduct of the cross-exams. This is a draft and is not set in stone, so we will look forward to receiving your input and further refining this document.

In terms of cross-examinations, we intend to cross-examine Ms. Nagle as well as Messrs Jost, Cornell, Gircys and Ristau on their affidavits. We are also prepared to make our affiants available in a timely manner. Could counsel on each application please confirm which of our affiants you intend to cross-examine?

That will help inform our discussion of next steps, although the motions to amend the notices of application remain outstanding in CFN/Nagle and CCF, and CCF's motion in relation to the record will not be heard until May 27; issues related to our proposed expert report also of course remain outstanding.

Thank you,

John

John Provart

Senior Counsel (*Mr / he / him*) | Avocat conseil (*M. / il / lui*)

Department of Justice Canada | Ministère de la Justice Canada

(647) 256-0784

From: [Provart, John](#)
To: [David Cowling](#); [Alexander Boissonneau-Lehner](#); [Simon Sigler](#); [Aditi Gupta](#); ["Janani Shanmuganathan"](#); ["Ewa Krajewska"](#); ["Sujit Choudhry"](#); ["mgourlay@hhllp.ca"](#); ["bsvandenbergh@fosterllp.ca"](#); ["bmiller@fosterllp.ca"](#); ["blair@ectorlaw.com"](#); ["Mandy England"](#)
Cc: [Anderson, R. Jeff](#); [Kohlman, Kathleen](#); [Coleman, Rebecca](#); [Widdifield, Shain](#); [Archibald-Graham, Karlene](#)
Subject: T-306-22, T-316-22, T-347-22 and T-382-22 - Cross-examination Protocol / Cross-examinations
Date: Tuesday, May 3, 2022 6:49:00 PM
Attachments: [Protocol for Virtual Cross-Examinations - EA Litigation - May 3 2022 Final Draft.docx](#)

Dear Counsel,

In advance of tomorrow's CMC, we wanted to provide you with a draft protocol for cross-examinations that we have been working on – consistent with the Court's direction of April 19. This is based on protocols that have been used in other cases involving multiple applicants and affiant cross-examinations, to foster the fair and efficient conduct of the cross-exams. This is a draft and is not set in stone, so we will look forward to receiving your input and further refining this document.

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Thank you,

John

John Provart

Senior Counsel (*Mr / he / him*) | Avocat conseil (*M. / il / lui*)

Department of Justice Canada | Ministère de la Justice Canada

(647) 256-0784

Court File Nos.: T-306-22
T-316-22
T-347-22
T-382-22

FEDERAL COURT

BETWEEN:

Docket No. T-306-22

CANADIAN FRONTLINE NURSES AND KRISTEN NAGLE

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket No. T-316-22

CANADIAN CIVIL LIBERTIES ASSOCIATION

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket No. T-347-22

CANADIAN CONSTITUTION FOUNDATION

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket No. T-382-22

JEREMIAH JOST, EDWARD CORNELL, VINCENT GIRCYS, AND HAROLD RISTAU
Applicants
and

**GOVERNOR IN COUNCIL, HER MAJESTY IN RIGHT OF CANADA, ATTORNEY
GENERAL OF CANADA, and MINISTER OF PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS**

Respondent

***(DRAFT)* DIRECTION**

DURING a Case Management Conference held on MONTH XX, 2022, by videoconference, the parties in all four (4) files provided the Court with their draft protocol for virtual cross-examinations. With the assistance of the Court, the protocol was finalised during the Case Management Conference. Therefore, the Court approves the attached Protocol for Virtual Cross-Examinations and directs that it applies in these proceedings (see Appendix I).

APPENDIX I.

(DRAFT) PROTOCOL FOR VIRTUAL CROSS-EXAMINATIONS

WHEREAS:

- A. The Applicants in Court File Nos. T-306-22, T-312-22, T-347-22, and T-382-22, (collectively, the “**Applicants**”) have filed Notices of Application seeking, *inter alia*, judicial review and *Charter* challenges (collectively, the “**Applications**”) of the Order in Council (PC Number 2022-106), *Proclamation Declaring a Public Order Emergency* (SOR/2022-20), *Emergencies Act* (R.S.C. 1985, c. 22 (4th Supp.)), *Emergency Measures Regulations* (P.C. 2022-107, SOR/2022-21) *Emergency Economic Measures Regulations* (P.C. 2022-107, SOR/2022-21), and *Emergency Economic Measures Order* (P.C. 2022-108, SOR/2022-22);
- B. The named Respondent in Court File Nos. T-306-22, T-312-22, T-347-22, is the Attorney General of Canada, and in Court File No. T-382-22 it is the Governor in Council, Her Majesty in Right of Canada, Attorney General of Canada, and Minister of Public Safety and Emergency Preparedness (collectively, the “**Respondent**”);
- C. The Applicants and the Respondent (collectively, the “**Parties**”) have filed or may file and intend to rely upon affidavits (including expert reports) in connection with the Applications (the “**Affidavits**”);
- D. The Parties wish to cross-examine on some or all the Affidavits filed (the “**Cross-Examinations**”);
- E. On April 19, 2022, the Case Management Judge, Prothonotary Milczynski, directed that the Parties consult with one another and submit a jointly proposed a protocol for the Cross-Examinations and the Parties have developed the following protocol to govern the conduct of the Cross-Examinations.
- F. The Parties have agreed that all the Cross-Examinations on the Affidavits will be conducted virtually, unless otherwise agreed in writing by the Parties’ counsel, due to the COVID-19 pandemic, public health orders as may be applicable throughout different jurisdictions, the inability or unwillingness of Affiants to attend in person, and the disparate locations of the Affiants;
- G. On May 4, 2022, the Case Management Judge, Madam Prothonotary Milczynski, directed that the Cross-Examinations are to be completed by XX, June 2022;

THEREFORE:

Application of the Protocol

1. This Protocol applies to the Cross-Examinations of affidavits filed in support of the parties' substantive positions on the main applications for Judicial Review and does not apply to, or bind the Parties with respect to, any other step or process, including any cross-examinations of proposed interveners in the Applications or any other cross-examinations to be conducted in the Applications, motions, or any other legal proceeding.

Application of the *Federal Courts Rules*

2. Subject to paragraph 3 of this Protocol, the Cross-Examinations will be conducted in accordance with the *Federal Courts Rules* (the "**Rules**").
3. In cases where this Protocol and the *Rules* conflict, this Protocol will prevail.

Separate Cross-Examinations

4. Each Cross-Examination of a given Affiant will be hosted and conducted separately. There shall be one Cross-Examination per Affiant, regardless of how many Affidavits each Affiant has sworn or affirmed in the Applications.
5. One Applicants' counsel from each Application will have an opportunity to cross-examine the Respondent's Affiants (the "**Examining Counsel**"). Each cross-examination of an Affiant shall be conducted in a consecutive manner, with the order to be determined amongst Applicants' counsel. If there is more than one Examining Counsel, questions posed to the Respondent's Affiants by Examining Counsel will not be substantively duplicative. No Examining Counsel who has completed their cross-examination may seek to cross-examine any Affiant again without leave of the Court or the consent of Respondent's counsel. Applicants' counsel from a given Application will not communicate with Applicants' counsel on the other Applications while the cross-examinations are being conducted.
6. One counsel from the Respondent's side will have an opportunity to cross-examine each or any of the Applicants' Affiants.
7. The transcript arising from the Cross-Examination shall be prepared in accordance with paragraphs 22 to 24 of this Protocol, and shall be available for use in each of the Applications in which the evidence of the Affiant has been filed or adopted by the Applicants or Respondent in a particular Application.

Objections

8. The following persons are entitled to make objections during a Cross-Examination:
 - (a) In the case of a Cross-Examination on one of the Applicants' Affidavits, one of the Applicants' Counsel from the Application in which the Affiant has sworn or affirmed the affidavits;
 - (b) In the case of a Cross-Examination on one of the Respondent's Affidavits, one of the Respondent's Counsel
 (the "**Objecting Counsel**").
9. No persons other than the Objecting Counsel may make objections during a Cross-Examination. If an objection is made, Examining Counsel / Respondent's Counsel may respond to it on the record and Objecting Counsel will indicate whether the objection will be maintained. Should the objection be maintained, a preliminary answer may be provided as contemplated by Rule 95(2) or Objecting Counsel may object to any answer being provided. There will be informal recourse to the Court within 48 hours of the completion of the Cross-Examinations for a determination of the propriety of the objection, following an exchange of submissions. Any objections that are overruled shall be answered by either recalling the witness or in writing, by way of an affidavit.
10. Should either counsel indicate that the Affiant should be excluded in the course of an objection or otherwise, the Affiant will move to a break-out room pending completion of the discussion.

Re-examination

11. Where necessary to have the Affiant explain and clarify relevant testimony that was specifically given during the Cross-Examination of that Affiant, the Party or Parties who served the Affiant's Affidavit(s), but not the Party or Parties who rely on the Affiant's Affidavit(s), may conduct a non-leading re-examination of the Witness. One counsel will conduct the re-examination.

Attendees

12. The following persons are permitted to attend or otherwise observe a Cross-Examination:
 - (a) the court reporter (the "**Court Reporter**");
 - (b) the Affiant being cross-examined (the "**Affiant**");
 - (c) counsel for the Applicants (the "**Applicants' Counsel**");
 - (d) one representative of the Applicants (other than the affiant, where applicable);

- (e) counsel for the Respondent (the “**Respondent’s Counsel**”);
 - (f) one representative of the Respondent (other than the Affiant, where applicable); and,
 - (g) Affiants being tendered as expert witnesses;
 - (h) IT professionals, paralegals, legal assistants, simultaneous translation services, and other support staff employed by the Applicants’ Counsel or the Department of Justice Canada(collectively, the “**Attendees**”).
13. The Parties and their counsel will take steps to ensure that only the Attendees are in attendance or otherwise able to observe during the Cross-Examinations.
14. At least three-business days before each scheduled Cross-Examination, the Attendees will cooperate and make best efforts to prepare and circulate the names, telephone numbers, and email addresses of:
- (a) The Court Reporter,
 - (b) The Affiant,
 - (c) The Examining Counsel / Respondent’s Counsel conducting the examination,
 - (d) The Objecting Counsel, and
 - (e) All other expected Attendees.
15. Arrangements for the Court Reporter will be the responsibility of party conducting the examination and that party will be responsible for payment of, and any other costs incurred by, the Court Reporter.
16. Simultaneous interpretation services, from one official language into the other, will be made available upon request of the Affiant and/or the Parties and any such expense will be borne by the party that seeks, or whose Affiant seeks, the interpretation.

Platform

17. The Court Reporter will host each Cross-Examination separately through the Zoom platform and will:
- (a) create a private meeting for each Cross-Examination;
 - (b) provide all necessary information for the Attendees to connect to each Cross-Examination (for example, virtual links and passwords); and
 - (c) provide such additional protocols, directions, or instructions as are necessary.
18. Attendees other than the Affiant, Examining Counsel / Respondent’s Counsel, Objecting Counsel and Court Reporter will disable their cameras and mute their microphones.
19. Chat rooms, discussion rooms and other similar features within the Zoom platform may

not be used during a Cross-Examination except with appropriate respect and decorum and for the following purposes:

- (a) to share relevant information amongst all the Attendees, such as a password to a document; and
- (b) for private communications among some, or all, of the Applicants' Counsel, and the Respondent's Counsel.

Technological Issues

- 20. In the event of a loss of internet connection, an interruption in the video or audio feed or other technological issues affecting the Cross-Examination, the Cross-Examination will be immediately suspended until such time as the issue has been fully resolved.
- 21. Every Attendee participating in the virtual Cross-Examination must use a separate laptop or computer that is equipped with an independent video and audio connection, and an internet connection.

Recordings

- 22. The Court Reporter will prepare a transcript as the only official record of a Cross-Examination. The Court Reporter may, at their discretion, maintain a recording of the Cross-Examination to ensure accuracy of the Transcript.
- 23. Transcripts will be prepared on an expedited basis and at the cost of the party conducting the examination.
- 24. Other than the Transcript, the Reporter's Recording, and any handwritten or typed notes prepared by the Applicants' Counsel and the Respondent's Counsel, the Attendees will not make any contemporaneous audio or video recordings of a Cross-Examination or otherwise broadcast or livestream or transmit the Cross-Examination on any platform or by any means.

The Affiant

- 25. Affiants will be given the opportunity to be cross-examined in the official language of their choice. Arrangements for simultaneous interpretation services will be made prior to the cross-examination by the party that seeks, or whose Affiant seeks, the interpretation.
- 26. After the Court Reporter has administered the oath or affirmation, the Examining Counsel / Respondent's Counsel will ask the Affiant the preliminary questions set out in Appendix "A" to this Protocol.
- 27. During a Cross-Examination (including breaks):

- (a) the Affiant will always keep the camera and microphone turned on unless otherwise instructed by the Examining Counsel / Respondent's Counsel;
- (b) the Affiant will position the camera to clearly show the Affiant's entire face and (where possible) the Affiant's hands, except for when the Affiant takes agreed upon breaks;
- (c) the Affiant will not use any virtual backgrounds or the blurring function within the Platform;
- (d) the Affiant will not have access to, and will not review, any documents, materials, or electronic resources other than:
 - (i) the Affidavit sworn or affirmed by the Affiant;
 - (ii) other Affidavits filed as part of the Applications that the Affiant may be asked by the Examining Counsel / Respondent's Counsel to review; and
 - (iii) documents put to the Affiant by the Examining Counsel / Respondent's Counsel.
- (e) a document will be "marked for identification" where the Affiant cannot authenticate said document (the "Marked for Identification Document"), and any Marked for Identification Document will not become part of the record unless so agreed by counsel.

Use of Documents

- 28. With the exception of up to two documents not exceeding five pages each (the "Excepted Documents"), Counsel will send all documents that they intend to put to the Affiant, including those referenced at subparagraphs 27(d)(ii) and (iii), electronically to the Affiant and Objecting Counsel at least three business days (72 hours, not including weekends or statutory holidays) before any Cross-Examination of that Affiant starts (referred to as "**Documents**"). Questions may be refused on Documents or evidence other than the Excepted Documents provided less than three business days (72 hours, not including weekends or statutory holidays) before the start of any Cross-Examination.
- 29. At the discretion of Examining Counsel / Respondent's Counsel, documents may be shown to the Affiant using the Platform's screen-sharing function, provided that the Affiant also has access to the full Document in either hard copy or electronic form to review.

Time / Length of cross-examinations

- 30. In order to accommodate the Affiants or experts to be cross-examined, and the Parties and counsel in different time zones, the Cross-Examinations will not begin before 11 am (EST) and will end by 5 pm (EST). Cross-examinations will be limited to a maximum of three

hours, with an hour break for lunch to be accommodated based on the time zone(s) of the Attendees. These times can be modified by agreement of all counsel participating in the Cross-Examinations, acting reasonably.

31. Without restricting the above, alternate scheduling arrangements will be made, at the agreement of the parties, for any Affiants located outside of North America.

Accommodations

32. The Parties will make best efforts to reasonably accommodate any Affiants with a hearing, vision, or other similar disability, provided such disability is disclosed in advance with reference to the accommodation that is reasonably required.

General

33. The Parties will not object to the admission of a transcript on the sole basis that the Cross-Examination was conducted virtually.
34. This Protocol may be signed electronically and in counterparts, and the counterparts, once assembled, will collectively constitute a fully executed and enforceable agreement.

AGREED TO ON BEHALF OF THE BELOW LISTED PARTIES THIS XXth DAY OF
MONTH, 2022

APPENDIX “A” TO PROTOCOL FOR REMOTE CROSS-EXAMINATION**Preliminary Questions (after oath/affirmation)**

Do you, [Affiant], confirm that:

1. You have agreed to be cross-examined by way of videoconference?
2. You have reviewed the Protocol for Virtual Cross-Examinations agreed to by the parties dated XX XX, 2022 and you agree to comply with and be bound by that Protocol?
3. You will not record or broadcast this cross-examination in any manner?
4. You will not mute or turn off your microphone, camera, or speakers, or move out of view of the camera during this cross-examination unless agreed upon or otherwise directed to do so by me?
5. You will not view during this cross-examination any device, documents, apps, or information other than your affidavit or as requested or presented to you during this cross-examination?
6. You have closed and will not reopen any other windows on your computer during this cross-examination?
7. You have taken steps to disable any pop-up notifications you expect would interrupt this cross-examination and will immediately close any that may appear?
8. You will not communicate in any way with any party outside of the virtual meeting during this cross-examination?

T-316-22 – Refusals Chart with CCLA and AGC Positions

Question No.	Question	CCLA Position	AGC Position
87	Whether Mr. Beaudoin could make inquiries about the existence of any documents, guidelines, or directions that the RCMP used or issued to its members that describes or explains what is meant by “individuals and entities who were actively involved in illegal action, either by organizing or influencing the illegal activities or being present at the illegal protest” at para. 16 of his affidavit.	Required by Direction to Attend (para. 5). The documents are both relevant and in Mr. Beaudoin’s possession, power, and control.	A witness is not required to provide undertakings on a cross-examination on their affidavit.
131	Whether Mr. Beaudoin can produce examples of the cover page used when the RCMP was forwarding (to financial institutions) information sent to it by the OPP or OPS.	Required by Direction to Attend (para. 4).	A witness is not required to provide undertakings on a cross-examination on their affidavit. The requested documents are not relevant to the matters raised on this application for judicial review. There is no entitlement to broad documentary disclosure as would be the case in an action.

Question No.	Question	CCLA Position	AGC Position
175	Whether Mr. Beaudoin could provide the email in his possession containing information provided to the RCMP by the OPP, which information related to the 15 suspects referred to at para. 14 of his affidavit	Required by Direction to Attend (para. 3).	A witness is not required to provide undertakings on a cross-examination on their affidavit.
203	Whether Mr. Beaudoin could produce his notes from the ‘process-establishing’ meeting(s) he had with financial institutions.	Required by Direction to Attend (para. 2). Mr. Beaudoin’s notes reflect the process the RCMP used to verify and share information with financial institutions. The notes are both relevant and in Mr. Beaudoin’s possession, power, and control.	A witness is not required to provide undertakings on a cross-examination on their affidavit. The requested documents are not relevant. There is no entitlement to broad documentary disclosure as would be the case in an action.
220	Whether the accounts of the 57 entities whose information was provided to financial institutions (referred to at para. 20 of Mr. Beaudoin’s affidavit) were frozen and whether this freezing was monitored by the RCMP	Mr. Beaudoin’s unwillingness or inability to connect the 57 entities and the 257 accounts undermines his statement that he has personal knowledge of them to the point of rendering his affidavit unusable. If he has personal knowledge of the facts deposed to in para. 20, he must answer this question	The witness has no personal knowledge.

Question No.	Question	CCLA Position	AGC Position
241	Whether Mr. Beaudoin could produce the written instruction to electronic financial service providers that the Emergency Economic Measures Order was not to be applied retroactively and could only be applied while the Order was in effect.	Required by direction to attend (para. 8).	A witness is not required to provide undertakings on a cross-examination on their affidavit. The requested documents are not relevant. There is no entitlement to broad documentary disclosure as would be the case in an action. In any event, these documents do not exist.
322	Whether Mr. Beaudoin could produce any examples of correspondence or documents exchanged between the RCMP, the Ontario Provincial Police, and the Ottawa police service, by which the RCMP sought out and collected relevant information regarding persons, vehicles, and entities, that were believed to be directly or indirectly involved in prohibited activities	Required by Direction to Attend (para. 3). The documents are relevant to the way in which the police operationalized the powers set out in the Emergency Economic Measures Order, which relates to the s. 8 Charter issues raised in the underlying application.	The question is vague and overbroad. It is unclear which documents are being sought. There is no entitlement to broad documentary disclosure as in an action.

Court File No.: T-316-22

FEDERAL COURT

BETWEEN:

CANADIAN CIVIL LIBERTIES ASSOCIATION

Moving Party / Applicant

and

ATTORNEY GENERAL OF CANADA

Responding Party / Respondent

**WRITTEN REPRESENTATIONS OF THE ATTORNEY GENERAL OF CANADA –
MOTION TO COMPEL**

July 12, 2022

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Civil Litigation Section
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8

David Aaron

Tel: (343) 804-9782

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Counsel for Respondent, the Attorney General of Canada

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OVERVIEW

1. During Mr. Beaudoin's cross-examination, he refused the CCLA's request for undertakings to look for and produce various documents. These refusals were proper: this Court's jurisprudence confirms that there is no obligation to provide undertakings during cross-examination on an affidavit. The requested order, which would compel Mr. Beaudoin to produce these documents, would contradict this well-established principle.

2. A witness is only required to produce documents on cross-examination on an affidavit where the documents are identified in a direction to attend served at least ten days in advance. The CCLA requested production of documents in a direction to attend served less than two business days before Mr. Beaudoin's cross-examination. The parties agreed to a cross-examination protocol in advance, in order to bring certainty and predictability to an otherwise unwieldy and procedurally complex process. Nothing in the protocol excused the CCLA's failure to serve a direction to attend in accordance with the *Federal Courts Rules*. An order excusing this non-compliance and compelling production now would undermine the respondent's reliance on the protocol, resulting in prejudice.

PART I – STATEMENT OF FACTS

3. On February 18, 2022, the CCLA commenced this application for judicial review challenging the invocation of the *Emergencies Act* and two regulations enacted thereunder.

4. In addition to the CCLA's application, the AGC is responding concurrently to three separate applications for judicial review dealing with the same or very similar subject matter.

5. On April 4, 2022, Denis Beaudoin, a superintendent with the Royal Canadian Mounted Police (RCMP), swore an affidavit setting out his personal knowledge of the manner in which the RCMP used the economic measures enacted pursuant to the *Emergencies Act*.

6. On Friday, June 17, 2022 at 2:17pm, the CCLA served a direction to attend on Mr. Beaudoin, in which it requested that he bring to his cross-examination and produce for inspection nine categories of documents.¹

7. The CCLA's cross-examination of Mr. Beaudoin commenced on Tuesday, June 21, 2022 at noon, less than two business days after the direction to attend was served.²

PART II – POINTS IN ISSUE

8. Whether Mr. Beaudoin should be required to produce the categories of documents requested by the CCLA.

PART III - SUBMISSIONS

i) Allowing documentary discovery or undertakings would be prejudicial

9. Cross-examination on an affidavit is not equivalent to discovery in an action and is not the proper method of obtaining relevant documents in the possession of the opposite party.³

10. A cross-examination on an affidavit is the direct testimonial evidence of the witness, Mr. Beaudoin. It is not a discovery of the RCMP or the Attorney General of Canada.⁴

11. Unlike examination for discovery, there is no obligation on an affiant to take steps to inform themselves or to give undertakings. If a witness lacks knowledge of matters contained in their affidavit, that may go to the witness' credibility, but it does not impose any further obligation.

¹ Affidavit of Barbara Brzezicki at para 2 and Exhibit A, AGC Responding Motion Record (RMR), Tab 1, p 1 and pp 4-7

² Transcript of cross-examination of Dennis Beaudoin, Applicant's Motion Record (AMR), Tab 4, pp 46-48.

³ *Jim Shot Both Sides v. Canada*, 2021 FC 280 (*Jim Shot Both Sides*) at [para 29](#), citing *Ward v Samson Cree Nation*, [2001 FCT 990](#) (*Ward*) at [para 3](#)

⁴ *Autodata Ltd v Autodata Solutions Co*, 2004 FC 1361 (*Autodata*) at [para 19](#)

Specifically, it does not require the witness to produce documents responsive to a question or to inform themselves and then return to answer the question.⁵

12. The CCLA seeks production of categories of documents that go beyond the scope of the certified record. In doing so, it attempts to obtain discovery of documents to which it is not entitled in the context of an application for judicial review. An examining party is not entitled to request or demand that an affiant undertake to produce documents during cross-examination on an affidavit.⁶

13. This Court has held that “[t]he summary and expeditious nature of judicial review is facilitated by requiring the party to request the production of documents before the cross-examination. That way, relevant documents are available at the examination. The summary nature of judicial review is not facilitated by adjourning cross-examinations on affidavits so that documents may be produced.”⁷

14. During Mr. Beaudoin’s cross-examination, counsel for the respondent refused to provide undertakings because they are not appropriate on a cross-examination.⁸ This position is supported by this Court’s jurisprudence. For example, Prothonotary Tabib cautioned:

*...a party who requests an answer by way of undertaking to make up for a witness' lack of knowledge or reliance on documents not duly produced, does so at its peril. Unless the parties have specifically agreed to adjourn the cross-examination pending completion of undertakings, or that answers given to undertakings are so clearly and demonstrably at odds with the evidentiary record that they equate to a refusal or misconduct, I can see no mechanism in the Federal Court Rules, 1998 to re-open a cross-examination to seek further production or put follow-up questions to a witness.*⁹

⁵ *Jim Shot Both Sides* at [para 29](#), citing *Ward* at [para 3](#).

⁶ *Preventous Collaborative Health v. Canada (Health)*, 2020 CanLII 32965 (FC) (*Preventative Collaborative Health*) at [para 16](#).

⁷ *Goodwin v. Canada (Attorney General)* (October 6, 2004) Doc. T-486-04 (F.C.), as cited in *Preventous Collaborative Health* at [para 17](#).

⁸ Transcript of cross-examination of Dennis Beaudoin, AMR, Tab 4, p. 69, lines 4-8.

⁹ *Autodata* at [para 20](#).

15. Other decisions of this Court have also confirmed that an examining party has no right to request or demand that a witness undertake to produce documents during a cross-examination on an affidavit.¹⁰

16. In the absence of an obligation to provide undertakings, granting the applicant's motion would be tantamount to requiring Mr. Beaudoin to give undertakings to produce documents and better inform himself before returning for further cross-examination on his answers to those undertakings. This result, which is contrary to the *Rules* and the Court's jurisprudence, would prejudice the respondent.

ii) *Mr. Beaudoin was not required to produce documents at his cross-examination*

17. Rule 91(3)(b) of the *Federal Courts Rules* states that “[a] direction to attend an oral examination shall be served where the person to be examined is not a party to the proceeding, at least 10 days before the day of the proposed examination”.¹¹

18. A direction to attend may direct the person being cross-examined on an affidavit to produce for inspection at the cross-examination all documents and other material in that person's possession, power or control that are relevant to the application.¹²

19. This Court has confirmed that “[p]roduction of documents on a cross-examination on an affidavit can only be enforced if the documents have been listed, or sufficiently identified, in a direction to attend duly served before the cross-examination pursuant to Rule 91(2)(c)”.¹³

20. Recently, Associate Chief Justice Gagné refused to compel production of certain documents for inspection on a cross-examination when the direction to attend requesting those documents was filed less than 10 days prior to the cross-examination.¹⁴

¹⁰ *Preventous Collaborative Health* at [para 16](#); *Ottawa Athletic Club v. Athletic Club Group Inc.*, 2014 FC 672 at [para 134](#); *Jim Shot Both Sides* at [para 29](#); *Ward* at [para 3](#)

¹¹ *Federal Courts Rules*, SOR/98-106, Rule 91(3)(b).

¹² *Federal Courts Rules*, SOR/98-106, Rule 91(2)(c).

¹³ *Preventous Collaborative Health* at [para 15](#), citing *Autodata* at [para 19](#).

¹⁴ *Canadian Coalition for Firearm Rights v. Canada (Attorney General)*, 2022 FC 332 (CanLII) at [paras 16-17](#). The Court did compel production of certain other documents where extenuating circumstances made compliance with that rule virtually impossible.

21. The CCLA did not duly serve its direction to attend on Mr. Beaudoin as mandated by Rule 91(3)(b). Instead, it served a direction to attend listing categories of documents that it wanted Mr. Beaudoin to produce for inspection at the cross-examination less than two working days prior to that cross-examination.¹⁵

22. In light of the CCLA's failure to duly serve a direction to attend, Mr. Beaudoin was not obliged to search for and produce for inspection the categories of documents requested less than two working days before his cross-examination. Mr. Beaudoin was entitled to use the time immediately prior to his cross-examination to review his affidavit and prepare for cross-examination without distraction.

iii) *Retroactive abridgment of time is not warranted*

23. The applicant seeks a retroactive abridgement of time under Rule 8 to serve its direction to attend. The factors the Court considers on a request to abridge time are:

- a. The urgency of the matter;
- b. Any prejudice to the responding party;
- c. Whether the matter would be rendered moot if not expedited; and
- d. Whether expediting the matter would prejudice other litigants by allowing "queue jumping".¹⁶

24. There is no urgency to the abridgment request because the CCLA has already cross-examined Mr. Beaudoin. Any urgency that may have existed arose prior to the cross-examination, when the CCLA realized that it could not comply with its obligation under Rule 91(3)(b). Where a party seeks to abridge time, it should do so at the earliest opportunity.¹⁷

¹⁵ The direction to attend was served on Friday, June 17 at 2:17pm; the cross-examination began on Tuesday, June 21 at noon.

¹⁶ *Alani v. Canada (Prime Minister)* 2015 FC 859 at [para 14](#).

¹⁷ *Winnicki v. Canada (Human Rights Commission)*, 2007 [FCA 3](#) (CanLII)

25. The CCLA did not bring this motion to abridge time prior to the cross-examination. Nor did it adjourn the cross-examination to seek an abridgment of time when advised that Mr. Beaudoin did not bring any documents to his cross-examination for inspection. Through its conduct, the CCLA has demonstrated that its abridgment request is not urgent.

26. The requested abridgment would prejudice the respondent. The AGC is responding to four parallel applications for judicial review related to the invocation of the *Emergencies Act*.¹⁸ As the applicant acknowledges, these applications have been procedurally complex.¹⁹ In recognition of this complexity, the AGC provided the parties with a draft cross-examination protocol to ensure the fair and efficient conduct of cross-examinations.²⁰ Counsel for the CCLA provided extensive comments on the draft protocol, most of which were incorporated into the final version of the protocol.²¹

27. Nothing in the protocol invalidates or supersedes the requirement of Rule 91(3)(b) to serve a direction to attend at least 10 days before the cross-examination. The respondent relied on the clarity and predictability provided by the protocol and *Rules*. An order undermining that reliance would be prejudicial.

28. Additionally, on June 13, 2022, the respondent asked the CCLA to advise of any documents Mr. Beaudoin would be expected to bring to his cross-examination.²² The CCLA did not do so until June 17, when it served its direction to attend less than two business days prior to Mr. Beaudoin's cross-examination. The complexities of finding mutually acceptable cross-examination dates do not excuse the CCLA's failure to respond to this inquiry in a timely manner. There is no explanation, other than scheduling logistics, to justify the CCLA's delay in advising of the documents it wanted Mr. Beaudoin to produce for inspection at his cross-examination.

29. The respondent met its obligations pursuant to the *Rules* and protocol with respect to Mr. Beaudoin's cross-examination; the CCLA did not. Under the circumstances, it would be unfair to

¹⁸ Notice of Motion at paras 1-2, AMR, Tab 1, p 5

¹⁹ Notice of Motion at para 5, AMR, Tab 1, p 5

²⁰ Affidavit of Barbara Brzezicki at para 3 and Exhibit B, RMR, Tab 1, p 2 and pp 9-21

²¹ Notice of Motion at para 16, AMR, Tab 1, p 7

²² Notice of motion at para 25, AMR, Tab 1, p 8

abridge time retroactively to excuse the applicant's non-compliance and impose new obligations on the respondent not contemplated by the protocol or the *Rules*.

30. The CCLA failed to comply with its obligations under Rule 91(3)(b). The cross-examination protocol agreed to by the parties does not excuse this non-compliance. The applicant must bear any resulting consequences.

PART IV - ORDER SOUGHT

31. For the reasons noted above, the respondent requests that the applicant's motion be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Ottawa, in the province of Ontario, this 12th day of July, 2022.

David Aaron
Counsel for the Respondent

PART V – LIST OF AUTHORITIES

CASELAW

1. *Alani v. Canada (Prime Minister)* [2015 FC 859](#)
2. *Autodata Ltd. v. Autodata Solutions Co.*, [2004 FC 1361](#)
3. *Canadian Coalition for Firearm Rights v. Canada (Attorney General)*, [2022 FC 332](#)
4. *Goodwin v. Canada (Attorney General)* (October 6, 2004) [Doc. T-486-04 \(F.C.\)](#)
5. *Jim Shot Both Sides v. Canada*, [2021 FC 280](#)
6. *Ottawa Athletic Club v. Athletic Club Group Inc.*, [2014 FC 672](#)
7. *Preventous Collaborative Health v. Canada (Health)*, [2020 CanLII 32965 FC](#)
8. *Ward v Samson Cree Nation*, [2001 FCT 990](#)
9. *Winnicki v. Canada (Human Rights Commission)*, [2007 FCA 3](#)

APPENDIX A – STATUTES AND REGULATIONS

<i>Federal Courts Rules</i>, SOR/98-106, Rule 91(3)(b) Direction to attend ... Service of direction to attend... (b) where the person to be examined is not a party to the proceeding, at least 10 days before the day of the proposed examination;	<i>Règles des Cours fédérales</i>, DORS/98-106, Règle 91(3)(b) Assignment à comparaître ... Signification de l'assignation... b) si elle ne s'adresse pas à une partie à l'instance, au moins 10 jours avant la date de l'interrogatoire;
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